

**QUARTERLY ATTORNEY REPORT
ENTERPRISE
October 2004**

TO: CRWCD ENTERPRISE BOARD OF DIRECTORS

FROM: PETER C. FLEMING, GENERAL COUNSEL
JILL MCCONAUGHY, ASSOCIATE COUNSEL
KIRSTIN GILLESPIE, STAFF COUNSEL

Dear Directors:

This report identifies matters for potential discussion at the October 20, 2004, meeting of the River District's Enterprise. A separate Confidential Report (which follows the General Report) addresses confidential matters. The information in this report is current as of October 8, 2004, and will be supplemented as necessary before or at the Board meeting.

I. EXECUTIVE SESSION

The following is a list of matters that qualify for discussion in executive session pursuant to C.R.S. §§ 24-6-402(4)(a), (b) and (e):

- A. Elkhead Reservoir Enlargement Application, Contract Negotiations and Property Acquisition.
- B. Application of Tri-State Generation and Transmission Company, Case No. 03CW314, Water Division 5.
- C. Agreement with Eagle County for Reassignment of Eagle Park Reservoir Company Shares.
- D. Colorado Springs Utilities Substitution NEPA Process.

II. WATER PROJECTS

- A. **Elkhead Reservoir Enlargement Application, Agreement Negotiations, and Property Acquisition Issues.**

The River District filed an application for water storage rights for the Elkhead Reservoir Enlargement in December 2002, in Case No. 02CW106, Water Division 6. The only party that filed a statement of opposition to the application is Tri-State Generation & Transmission Association. We provided Tri-State with a proposed ruling last year. Tri-State indicated that they are generally satisfied with the proposed ruling but want to ensure that it is consistent with the final "Amended and Restated" agreement between the River District, the City of Craig, and the Yampa Participants (of which Tri-State is the lead negotiator). For this reason, the case has been dormant during the lengthy negotiations on the agreement with the Yampa Participants. That agreement is now close to resolution. We will revise the draft ruling so that it is consistent with the agreement and we will request that Tri-State sign-off on the proposed ruling once the agreement has been finalized.

The Board may wish to discuss some Elkhead Reservoir Enlargement issues in executive session. Potential topics include: the Amended & Restated Agreement with the Yampa Participants and Craig; the Water Supply Agreement and Interim Water Supply Agreement with Tri-State; the suite of Federal and State Agreements; property acquisition matters; and the CWCB Loan Contract.

B. Diligence Application of Tri-State Generation & Transmission Association, Case No. 02CW314, Water Division 5.

The case involves a diligence application of Tri-State Generation & Transmission Association for conditional water rights that are upstream of, and senior in priority to, the River District's Wolford Mountain Reservoir. The conditional water rights at issue include parts of the old Four Counties Project water rights, a proposed transmountain diversion project, and rights in Rabbit Ears Reservoir. During the pendency of the case, the parties discovered that the ditch near the top of Muddy Pass is in disrepair and needs work to ensure that water is not diverted from Water Division 5 into Water Division 6 (the North Platte River portion of Division 6) without the intent to beneficially use the water.

The River District previously proposed to withdraw from the case if Tri-State (1) agreed to fix the ditch so that it no longer inadvertently diverts water into Water Division 6, and (2) agreed to limit the use of the rights to Water Division 5. Tri-State rejected that proposal and instead has proposed to settle the matter by conveying the water rights and facilities to the River District in exchange for the River District granting Tri-State a fifteen year option and right of first refusal to purchase 1,000 acre feet of future storage space in the Elkhead Reservoir enlargement project. As proposed by Tri-State, the stipulation would require that the River District and Tri-State negotiate the cost of exercising the option, and other applicable terms and conditions, at the time of purchase based on comparable market prices for similar storage option contracts.

We recommend that the Board discuss this matter further in executive session.

C. Agreement with Eagle County for Reassignment of Eagle Park Reservoir Co. Shares.

Last year, we assigned Eagle County 500 shares (representing 50 acre feet of yield) in the Eagle Park Reservoir Company pursuant to a pre-existing agreement that required the River District to assign the shares at the county's request. The county transferred 240 of the shares to the Upper Eagle Regional Water Authority, and then determined that it does not currently need the remaining 260 shares (representing 26 acre feet of yield) and wants to reassign the shares to the River District. We have negotiated an agreement with the county that allows the reassignment. A copy of the proposed agreement is included with your Board material as Attachment A. The basic concepts of the agreement are as follows:

- (1) The county will transfer the shares to the River District at no cost and will reimburse the River District for the Reservoir Company's assignment fees.
- (2) The county can direct the River District to issue a water marketing supply contract, based on the amount of water represented by the shares, to the county or its assigns subject to payment only of the River District's standard application fee and annual O&M charges (i.e., no capital recovery charges would be included in any contract).
- (3) The county can request a subsequent reassignment of shares back to the county and will pay the River District a \$500.00 processing fee and also pay the Reservoir Company's assignment fees.
- (4) When the county does not plan to use certain shares in a project year, the River District can use those shares for that project year (July - June) or lease the shares to third parties for that project year. The county retains the right to demand a water supply contract based on the shares or request transfer of the shares back to the county at any time, except during the term of a water supply contract issued by the River District for the shares.
- (5) The county will reimburse the River District for annual and special assessments on the shares unless the River District: (a) transfers the shares back to the county, (b) issues a water supply contract to the county based on the shares, (c) uses the shares for River District purposes for that project year, or (d) leases the shares to a third party pursuant to contract for that project year. As noted by the highlighted language in paragraph 5.a of the attached draft agreement, we are working on final language for the provision regarding payment of assessments when water is released for River District purposes without a contract. We will report to the Board on our suggested resolution of that final detail at the Board meeting.

We recommend that the Board approve the agreement with Eagle County for the reassignment of the county's 260 shares in the Eagle Park Reservoir Company to the River District, subject to resolution of paragraph 5.a. The Board may wish to discuss the agreement in executive session prior to taking final action.

D. Joint Application of the River District and City of Colorado Springs for CSU Substitution Plan, Case No. 03CW320, Water Division 5, and Consolidated Cases No. 2782, 5016 & 5017, U.S. District Court.

We filed this joint application with Colorado Springs Utilities ("CSU") at the end of December to adjudicate CSU's substitution plan, that will allow it to divert out-of-priority as against Green Mountain Reservoir and substitute releases from other West Slope sources, including an account the River District will maintain for CSU at Wolford Mountain Reservoir. We filed the application in Water Division 5 and the U.S. District Court because it implicates the Blue River Decree. Peter attended a hearing at the U.S. District Court on September 23, at which Judge Nottingham decided to dismiss the federal application pending resolution of the case by the water court. Judge Nottingham did invite the parties to bring the case back to him if necessary to resolve any disputed federal issues.

CSU recently entered into a Memorandum of Understanding with the Bureau of Reclamation related to the evaluation and execution of the proposed Substitution and Power Interference Agreements and the completion of the environmental review process required by the National Environmental Policy Act ("NEPA"), Endangered Species Act, National Historic Preservation Act, and other applicable laws.

We recommend that the Board authorize staff to seek cooperating agency status for the related NEPA review process in order to more fully participate in the NEPA process and protect our interests as a co-applicant for the substitution plan.

E. River District Application for Wolford Mountain Reservoir Second Enlargement, Case No. 03CW302, Water Division 5.

Pursuant to the Board's direction, we filed an application at the end of December 2003 for a conditional storage water right in the amount of 9,775 acre feet for the Wolford Mountain Reservoir Second Enlargement. A total of five statements of opposition were filed by the City and County of Denver, City of Colorado Springs Utilities, Grand Valley Water Users Association, Ute Water Conservancy District, and Orchard Mesa Irrigation District. We received the Division Engineer's summary of consultation, which raised concerns about the River District's claims relating to refilling the enlargement and reusing the enlargement water. The River District should continue to conduct engineering studies necessary to determine the precise size of the enlargement and to engage in discussions with the objectors regarding the use and any potential limits on the use

of the claimed right. We will draft a proposed ruling in the near term to facilitate discussions with the objectors.

F. Prepayment of CWCB Loan for Wolford Mountain Reservoir.

Special counsel Lee Leavenworth previously reported to the Board that the CWCB decided to allow the River District to prepay its loan for Wolford Mountain Reservoir without penalty. A copy of Lee's letter the CWCB and the CWCB's response on this subject is included with your Board material as Attachment B. The River District Board should determine in conjunction with River District staff whether to make prepayments on its Wolford Mountain Reservoir loan in order to reduce the overall interest paid over the life of the loan.

G. Ratification of Statement of Opposition, Application of Colorow at Squaw Creek Homeowners Association, Case No. 04CW84, Water Division 5.

We filed a statement of opposition at the end of July in Case No. 04CW84, Water Division 5, an application of Colorow at Squaw Creek Homeowners Association, that proposes to use the District's water supplies based on a future contract. We will work with the applicants on a water supply contract and appropriate language to be contained in any proposed decree. A copy of our statement of opposition is included with your Board material as Attachment C.

We recommend that the Board ratify the River District's statement of opposition.

H. Old Dillon Reservoir.

In June, the Board granted conceptual approval to an Intergovernmental Agreement ("IGA") with Summit County to establish a framework for the River District's participation in the enlargement of Old Dillon Reservoir. Since that time, we have been working with Summit County to finalize the details of the IGA. We hope to have a proposed IGA to present to the Board at the October meeting for final approval.

I. New Eagle River Supply.

At the July Board meeting, the Board approved a new pricing structure for the River District's additional 125 acre-feet of Eagle River Supply and authorized the marketing of up to 30 acre-feet of that supply. We have pending applications for the entire 30 acre-feet, but we have not been able to enter into contracts because of concerns that have been raised by Colorado Springs regarding the accounting of the exchanges into Homestake Reservoir and whether the exchanges made in 2004 should be credited to the West Slope's original exchange account (under the 1998 Exchange Agreement) or the new exchange account (under the 2004 Water Exchange Agreement). Under the terms of the new agreement, the River District is entitled only to an amount up to the River District's balance in the new exchange account. In light of the accounting concerns, we are

working with the Eagle Park Reservoir Company (“EPRC”) and the Cities of Aurora and Colorado Springs to develop accounting principles, and the EPRC has asked Tom Williamsen of Helton & Williamsen to prepare hydrology assumptions for the new Eagle River Supply. Dave Merritt has proposed in his memo to the Board that the River District make another 20 acre feet of the new Eagle River supply available for marketing.

III. OTHER MATTERS

A. Revisions to Water Marketing Policy and Water Supply Contract Form.

We revised the Water Marketing Policy and Water Supply Contract to implement the Board’s decision in June to give all contractors the option of converting their payment option for long-term contracts from annual to upfront within three years of contract execution. The revised Policy also includes the new pricing for the River District’s Eagle River Supply. The revised Policy and Contract are included with your Board material as Attachments D and E.

We recommend that the Board ratify the revised Policy and Contract.

Attachments:

Confidential Report from P. Fleming, October 8, 2004 (attached to the General Report)

- A. Draft Agreement with Eagle County for Reassignment of Eagle Park Reservoir Company Shares, dated October 7, 2004
- B. Letter from Lee Leavenworth, dated March 15, 2004; Letter from Jan Illian, dated March 30, 2004
- C. CRWCD’s Statement of Opposition, Case No. 04CW84, Water Division 5, dated July 30, 2004
- D. Revised Water Marketing Policy, dated July 21, 2004
- E. Revised Water Supply Contract, draft dated September 22, 2004